

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA

PLAINTIFF

v.

Case No. 4:05-CV-00329-GKF-SAJ

TYSON FOODS, INC., et.al.

DEFENDANTS

**GEORGE’S, INC., AND GEORGE’S FARMS, INC.’S RESPONSE
IN OPPOSITION TO PLAINTIFF’S MOTION TO EXPAND
THE DISCOVERY PERIOD [DKT. #1418]**

Come now defendants, George’s, Inc., and George’s Farms, Inc. (“George’s”), and for their Response to Plaintiff’s Motion to Expand the Discovery Period [Dkt. # 1418], states as follows, to-wit:

INTRODUCTION

The Plaintiff brings its Motion to Expand the Discovery Period in a clear attempt to circumvent the Court’s orders limiting George’s obligations to locate and produce documents in this case. *See* Order of July 6, 2007 [Dkt. # 1207] and Order of October 24, 2007 [Dkt. #1336]. In support of the Motion, the Plaintiff references its own Second Amended Complaint, an inapplicable statute, and an affidavit of its own agency employee.

The current discovery matter seeks to overturn the considered judgment of this Court when it already passed on this issue on at least two occasions. Moreover, Plaintiff has been provided multiple years of George’s operational documents for the IRW in both electronic and hard copy format, without limit as to temporal scope. This information was limited only by its accessibility to George’s, its relevancy to the IRW, and in the case of “corporate knowledge” its relevancy to the issues in the case. The productions by George’s were not limited by date. As the motion relates to any other defendants, Plaintiff has failed to show the relevance of any

documents created more than five years ago, presenting this Court with only broad allegations of relevance rather than actual evidence of the relevance of any specific documents or categories of documents that the Plaintiff claims were not produced on the basis of temporal scope.

I. Discussion

A. The Motion Does Not Apply to George's

The Plaintiff has been provided multiple years of George's operational documents for the IRW in both electronic and hard copy format. The primary information which the Plaintiff claims it wants -- bird and feed totals -- was provided by George's in 2006, going back as far as George's has the information. George's did then go through those very same records and perform the simple arithmetic for the Plaintiff after the Court's order to that effect in late 2007, and supplemented its Interrogatory response in that regard in early 2008. But Plaintiff already had the very same information in its possession for 2 years before that supplementation.

Additionally, George's has in fact produced the relevant documents for the IRW going back as far as it has such records, to the extent such information was either in hard copy form or a readily accessible electronic form -- this includes soil tests, grower files, feed totals, bird totals, contracts, nutrient management plans, newsletters, brochures, educational seminars, email communications, and the like. This information was limited only by its accessibility to George's, its relevancy to the watershed or, with respect to corporate knowledge, its relevancy to the issues in the case. It was not limited by date.

Certainly, Plaintiff has now had ample opportunity to see the spectrum of documents related to George's business as it pertains to the issues in the case and to the IRW, and to the extent the Plaintiff believes there is some additional information in that regard that it is not being

provided solely on the basis of a date restriction, it could identify the specific information it believes is being withheld on the basis of such a temporal distinction so that the parties could have that conversation. George's certainly cannot produce information it does not have, nor can it guess as to any additional documents the Plaintiff believes have been withheld based on temporal scope, particularly because George's believes that it has already produced its documents without regard to date if the documents were relevant to the case and accessible to the defendant. George's cannot respond to vague generalizations that "the defendants" have not produced some unspecified documents that the Plaintiff claims it wants but is unable to identify with any specificity.

Accordingly, George's does not object to the general notion of producing information dated before 2000, but respectfully states that it has already produced such information to the extent it was reasonably related to corporate knowledge of the issues in the case, to operations in the IRW, and so long as it was readily accessible with respect to documents in electronic form. The Plaintiff has not indicated to George's that there are in fact documents which it believes George's is withholding on the basis of a date restriction, nor did the Plaintiff meet and confer with George's to have a discussion about whether George's, specifically, is withholding any documents solely on the basis of a date restriction, and if so, what those specific types of documents are.

Because George's did not impose a temporal limitation on its productions, Plaintiff's Motion does not apply to George's. Therefore, the Court should deny Plaintiff's Motion as moot with respect to George's.

B. Plaintiff's Have Failed to Show Any Reason to Expand the Discovery Period

The Plaintiff's Motion fails to address the key issues of relevance and overbreadth. The Court has already held that, in order to justify expansion of the discovery period, the State must show the relevance of information about litter application practices in the distant past to the current condition of the IRW. *See* July 6, 2007 Order [Dkt. # 1207] and October 24, 2007 Order [Dkt. # 1336]. This conforms to the general principals surrounding such discovery, whereby courts have held that discovery requests must be tailored so that they seek relevant information and the responding party does not have to perform mental gymnastics in order to make a determination of responsiveness. *See, e.g., Mackey v. IBP, Inc.*, 167 F.R.D. 186, 197 (D.Kan.1996). Moreover, discovery requests are to be limited to a reasonable time period, to a reasonable geographic scope and to issues that are relevant in the case. *See, e.g., Azimi v. United Parcel Service, Inc.*, 2007 WL 2010937 (D.Kan., July 9, 2007).

The Plaintiff's discovery requests were never sufficiently tailored in this respect, and formed the basis for objections by George's and other defendants to their facial overbreadth. Most of the requests provided no temporal limitation of any kind. A very few provided a temporal definition seeking documents back into the 1950's. Many requests provided no geographic limitation of any kind. These overbroad and irrelevant requests have been the subject of numerous discovery disputes before this Court, and culminated in two such disputes with the Court's orders of July 6, 2007 and October 24, 2007. *See* July 6, 2007 Order [Dkt. # 1207] and October 24, 2007 Order [Dkt. # 1336].

In those orders, the Court set out a five year temporal limit, and also set out the burden for the Plaintiff to obtain discovery for time frames beyond the five year temporal limit. Specifically, the Court held that the Plaintiff must provide "extensive briefing on the legal issues

presented and expert testimony on the impact of chicken waste application in the distant past upon the current condition of the watershed.” *See* July 6, 2007 Order [Dkt. # 1207]. The Plaintiff has utterly failed in this regard. Rather, it has provided only an affidavit from its own agent stating a conclusory allegation about the effects of poultry litter applications in the past, and then cited the Court to its own claims in its Second Amended Complaint and its own statute regarding duration of misconduct as grounds for punitive damages. These are insufficient to meet the demands set out in this Court’s orders for expansion of the discovery period.

The affidavit of Shannon Phillips, an employee of the Oklahoma Conservation Commission, is merely a conclusory summary of Plaintiff’s claims. The affidavit discusses only general water quality in the IRW and makes broad, unsupported conclusions that poultry litter negatively affects water quality. The affidavit in no way demonstrates the relevancy of any particular documents created by George’s beyond the five year discovery period.

Likewise, the Second Amended Complaint fails to provide a basis for expanding the five year discovery period. The Plaintiff relies on this Complaint and on the cases of *State v. Tidmore*, 674 P.2d 14 (Okla. 1983) and *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131 (Okla. 1988), all taken together for the supposed proposition that the State may bring a cause of action to enforce a public right despite the lapse of the applicable statute of limitations. Whether or not those cases are in fact applicable to the present action (which is denied by George’s and which issue is not before the Court on this Motion), without question the cases cited do not grant the State an unfettered right to discover information pertaining to a period of time beyond the discovery scope prescribed by the Court.

In fact, the law is well settled on the point that the Court has broad discretion to define the scope of discovery, which inherently encompasses the ability to deny such discovery when

the materials sought are overly broad or burdensome to produce, when production of the materials may delay the case, or when the materials are not relevant (or marginally relevant) to the issues in the case. *See, e.g., MediaNews Group, Inc. v. McCarthy*, 494 F.3d 1254 (10th Cir. 2007); *Santana v. City & County of Denver*, 488 F.3d 860, 867 (10th Cir. 2007). Thus, the cases cited by the Plaintiff are inapposite on the issues of whether the Court has the discretion to set limits, including temporal limits, on discovery and on whether the Plaintiff has met its burden for expansion of the discovery period set forth in the Court's Orders of July 6, 2007 and October 24, 2007. *See* July 6, 2007 Order [Dkt. # 1207] and October 24, 2007 Order [Dkt. # 1336].

Finally, the State cites the Court to an Oklahoma statute, 23 Okla. Stat. Ann. § 9.1(A)(3), for the proposition that because a jury may award punitive damages based in part upon "the duration of the misconduct," this Court must expand the discovery period. However, Plaintiff fails to point the Court to any George's (or other defendants') documents or category of documents which are relevant to a punitive damages claim, or any documents along those lines which George's has withheld on the basis of a temporal limit in discovery. Moreover, at the time that this Court issued its July 6, 2007 Order which initially set forth the temporal limit at issue, the Plaintiff had already asserted a claim for punitive damages, so nothing has changed since the Court entered the Order. Accordingly, the Court should deny Plaintiff's Motion.

II. Conclusion

George's has produced documents for the IRW going back as far as it has such records for any relevant information, to the extent such information was either in hard copy form or a readily accessible electronic form. This information was limited only by its accessibility to George's, its relevancy to the watershed or, with respect to corporate knowledge, its relevancy to

the issues in the case. To the extent the Plaintiff believes there is some additional information in that regard that it is not being provided solely on the basis of a date restriction, it should identify the specific information it believes is being withheld on the basis of such a temporal distinction. Because George's did not impose a temporal limitation on its productions, Plaintiff's Motion is moot with respect to George's and should be denied.

Additionally, the Plaintiff has failed to provide any basis for expansion of the discovery period as to any defendant. The Court has exercised its well established discretion over the scope of discovery and held that, in order to justify expansion of the discovery period, the State must show the relevance of information about litter application practices in the distant past to the current condition of the IRW. The Plaintiff has failed in this regard, providing only an affidavit from its own agent stating a conclusory allegation about the effects of poultry litter applications in the past, and citing the court to its own claims in its Second Amended Complaint and its own statute regarding duration of misconduct as grounds for punitive damages. The Plaintiff has failed to demonstrate any unproduced documents outside the temporal scope set by the Court which have any bearing on a claim for punitive damages, and has failed to show why the Court should alter the temporal scope when the same claims by the State already existed at the time of this Court's orders framing the current temporal scope. Thus, the Plaintiff's arguments are insufficient to meet the demands set out in this Court's orders for expansion of the discovery period, and the Plaintiff's Motion should be denied.

WHEREFORE, defendants, George's, Inc., and George's Farms, Inc., request that this Court deny the State of Oklahoma's Motion to Expand the Discovery Period, and for any and all other relief to which they may be entitled.

BY: /s/ James M. Graves

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CERTIFICATE OF SERVICE

I certify that on the 21st day of March, 2008, I electronically transmitted the attached document to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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